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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARY DREXLER, formerly the Sheriff of Tazewell County, and RALPH HODGSON, Sheriff of Tazewell County,

Petitioners,

v.

ROBERT LICKISS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals abdicated its obligation to independently determine the content and scope of the First Amendment when it concluded, solely on the basis of the Plaintiff sheriff's sergeant's civil service status, that the Plaintiff did not occupy a position of trust within the sheriff's department, in conflict with the approach mandated in *Branti v. Finkel*, 445 U.S. 507 (1980), and with decisions from the First, Third, Fourth, and Sixth Circuits.

2. Whether, in concluding that Plaintiff's civil service protections qualified him as a nonconfidential employee under *Branti*, the Seventh Circuit deprived Defendants of any consideration of their claim to qualified immunity on Plaintiff's First Amendment claim when it failed to determine whether Plaintiff's status as a nonconfidential employee was clearly established.

3. Whether the court of appeals' conclusion that principles of due process entitled the Plaintiff sheriff's sergeant, who was suspended without pay for twelve days, to a presuspension hearing, in addition to a pretermination hearing, contravened this Court's decision in *Gilbert v. Homar*, 117 S. Ct. 1807 (1997).

4. Whether, in holding that the Plaintiff's right to a presuspension hearing was clearly established, the court of appeals' sole reliance on an overruled decision from 1975 and its failure to consider this Court's decision in *Gilbert v. Homar*, 117 S. Ct. 1807 (1997), deprived Defendants of fair consideration of their claim to qualified immunity on Plaintiff's due process claim.

PARTIES TO THE PROCEEDINGS

Respondent Robert Lickiss brought this action against the County of Tazewell and Petitioners Mary Drexler, former sheriff of Tazewell County, and Ralph Hodgson, Sheriff of Tazewell County. There are no other parties to these proceedings.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 141 F.3d 1220 and is reprinted in the Appendix. (App. 1-6). The opinion of the United States District Court for the Central District of Illinois, Peoria Division, has not been reported. It is reprinted in the Appendix. (App. 9-31).

JURISDICTIONAL STATEMENT

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals for the Seventh Circuit entered judgment on April 21, 1998. (App. 1). Petitioners filed a Petition for Rehearing, which was denied on June 30, 1998. (App. 7-8). This Petition for a *Writ of Certiorari* was filed within 90 days of the denial of the Petition for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment I; United States Constitution, Amendment XIV, § 1; and 42 U.S.C. § 1983 are implicated in this case.

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

During the 1994 campaign for sheriff in Tazewell County, Illinois, Respondent Robert Lickiss ("Lickiss"), a sergeant in the sheriff's department, actively supported and campaigned for the republican candidate for sheriff. (R. 1, ¶¶ 12-15, 17, 31-34, 40, 43; R. 92, Ex. 4 at 80-84). The democratic candidate for sheriff was Chief Deputy Sheriff Ralph Hodgson ("Hodgson"), whose candidacy was supported by interim Sheriff Mary Drexler. (R. 1, ¶ 13).[1]

In July 1994 Lickiss received a complaint that Deputy Sheriff Michael Steinborn ("Steinborn") had been pestering girlfriend Kathy Lund's relatives and their coworkers in an attempt to locate Ms. Lund. (R. 92, Ex. 3; Ex. 4 at 135-37). Lickiss was further informed that when Steinborn discovered Lund with another man, Steinborn began hitting himself in the head, and he placed his service revolver to his head and threatened to kill himself in Lund's presence.[2] (*Id.*). Steinborn supported Hodgson's candidacy for sheriff. (R. 1, ¶ 17).

When Sergeant Lickiss informed Drexler and Hodgson about the complaint against Steinborn, Sheriff Drexler instructed Lickiss to prepare a written report of the incident and to provide a copy to Tazewell County Assistant State's Attorney Stewart Umholtz ("Umholtz").

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[1] Sergeant Lickiss was hired and promoted under a merit commission system. (R. 96, Ex. 18 at 488). Throughout this Petition, the terms "merit commission" and "civil service" will be used interchangeably.

[2] The court of appeals' statement that Steinborn had threatened anyone other than himself is not supported by the record.

(R. 92, Ex. 5 at 34-35; Ex. 6 at 5-7; Ex. 7 at 503-04). Sheriff Drexler then placed Steinborn on a forced vacation and required him to obtain clearance from a psychiatrist before returning to work. (R. 92, Ex. 1 at 60-61; Ex. 5 at 35-36; Ex. 6 at 5-6; Ex. 8 at 1). Sheriff Drexler instructed Sergeant Lickiss to do no further investigation on the case, told him not tell anyone about the matter, and told him that she would ask the Illinois State Police Department of Criminal Investigations to investigate. (R. 92, Ex. 4 at 143-48; Ex. 6 at 7; Ex. 7 at 504-05; Ex. 8 at 1). The Illinois State Police subsequently declined Drexler's request to conduct an investigation. (R. 92, Ex. 5 at 46).

On August 23, 1994, Lickiss informed Umholtz that he had further information on the Steinborn matter which he would provide to Umholtz in a report, but that he would not provide the information to the sheriff or the chief deputy. (R. 92, Ex. 8 at 2-3). On August 30, 1994, Lickiss delivered a report to Umholtz stating that on August 23 the original complainant told Lickiss that when she originally told him about Steinborn, she forgot to mention that Steinborn had continued to visit Lund's relatives' house after he had been asked to stop. (R. 92, Ex. 15).

In early October 1994 Sheriff Drexler was informed that Sergeant Lickiss had compiled yet another report concerning Steinborn and that Lickiss had worked on it during overtime. (R. 92, Ex. 2 at 294-301, 354-56; Ex. 5 at 80-82; Exs. 17-20). Pursuant to Sheriff Drexler's order, Sergeant Lickiss gave Drexler a computer disk containing the reports and other documents that he prepared while on duty October 6. (R. 92, Ex. 5 at 82;

Exs. 22-24). The computer disk contained a report to the Tazewell County State's Attorney summarizing an interview Sergeant Lickiss conducted with Lund on September 26 regarding her relationship with Steinborn. (R. 92, Ex. 25). In addition, the computer disk contained a five-page letter from Sergeant Lickiss to the republican candidate for sheriff, which included issues the candidate could use in his campaign against Chief Deputy Hodgson and which strongly criticized Drexler, Hodgson, and the current administration. (R. 92, Ex. 26; Ex. 54). Portions of the letter were prepared while Sergeant Lickiss was on duty. (R. 92, Ex. 7 at 587; Ex. 4 at 80-84; Ex. 54 at 21-32).

On October 12, 1994, Drexler assigned two detectives to investigate the Steinborn/Lund matter and Lickiss' activities in connection therewith. (R. 92, Ex. 22). Among other things, the detectives advised Sheriff Drexler that they learned that Lickiss had been speaking with a local newspaper reporter concerning the Sheriff's lax handling of the Steinborn matter. (R. 92, Ex. 33; Ex. 41 at 8). On October 14, 1994, that newspaper reporter published an article that quoted Lickiss directly and which strongly criticized the sheriff's department's handling of the Steinborn matter. (R. 92, Ex. 34).

On October 19, 1994, Sheriff Drexler sent Sergeant Lickiss a letter advising him that he was "being suspended without pay, pending an investigation for further discipline up to and including discharge." (R. 92, Ex. 44). The letter described the basis of the discipline as: (1) unlawful release of information from an employee personnel file; (2) insubordination; (3) improper

conduct while on duty; (4) cooperation in investigations; (5) criticism of employees or direct orders; (6) truthfulness; (7) intervention; and (8) political activities while on duty. (*Id.*). Eight days later a labor attorney who was assisting Drexler sent Lickiss a letter advising that the "Department has substantially completed their investigation and based upon the information that we presently have, believe that there is just cause to terminate your employment." (R. 92, Ex. 46, p. 1). The letter stated that "[b]efore we make our decision to terminate final, we want to give you an opportunity to respond to the charges that we informally notified you of on October 19, 1994, as well as others that are included with this correspondence." (*Id.*, p. 1). The letter then elaborated on the eight charges listed in the October 19 letter and added others. (*Id.*, pp. 1-3). The charges focused primarily on Lickiss' continued investigation of the Steinborn/Lund matter, his release of information to the press and private parties, and his June 7, 1994, political letter to the republican candidate for sheriff. (*Id.*) The letter scheduled a meeting with Sheriff Drexler for October 31, 1994, at which Lickiss would "be given an opportunity to present [his] side of the violations [he had] been charged with." (*Id.*, p. 3).

On November 28, 1994, Sheriff Drexler sent a letter to Lickiss advising that he was terminated as of that date. On December 1, 1994, Lickiss filed a formal notice of grievance. (R. 92, Ex. 48). On that same day Hodgson assumed the office of sheriff after having defeated the republican candidate in the November sheriff's election. (R. 92, Ex. 1 at ¶ 15; Ex. 49). In February 1995 Hodgson notified Lickiss that he was reinstated and that his discipline was reduced to a two-week unpaid

suspension and a demotion from sergeant to deputy. (R. 92, Ex. 50). Lickiss subsequently filed a grievance against his suspension and demotion. (R. 92, Ex. 51). An arbitration hearing was held on four separate dates, during which time Lickiss, who was represented by counsel, presented evidence and argument in support of his grievance. (*Id.*; Ex. 52 at 1-2). The arbitrator upheld Lickiss' demotion but overturned his two-week suspension and awarded him back pay on the ground that he should have had an opportunity to present his side of the story before the October 19 notice of suspension. (*Id.* at 60).

Lickiss filed a two-count complaint under 42 U.S.C. § 1983 in the Federal District Court for the Central District of Illinois, Peoria Division, against the County of Tazewell and Petitioners Drexler and Hodgson. In Count I Lickiss alleged that the disciplinary actions against him violated his First Amendment right to provide political support to Hodgson's adversary in the upcoming election and his First Amendment right to investigate and report Steinborn's misconduct to the Tazewell County State's Attorney. (R. 1). In Count II Lickiss alleged that his procedural due process rights were violated when he was suspended without pay on October 19, 1994, without first being afforded a pre-suspension hearing. The district court had jurisdiction over the complaint pursuant to 28 U.S.C. §§ 1331 and 1343(3). (*Id.*).

The district court *sua sponte* dismissed that portion of Count I which alleged political retaliation. Following discovery, Drexler and Hodgson moved for summary judgment on the remaining free speech and due process

claims on the grounds of qualified immunity. The district court denied the motion in its entirety. (App. 9-31).

Drexler and Hodgson appealed the denial of their claims of qualified immunity. On April 23, 1998, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision. (App. 1-6). In its opinion the Seventh Circuit merged its analysis of the First Amendment and due process claims. It concluded that Lickiss' clearly established due process rights were violated because he was not afforded a presuspension hearing. In doing so, the court ignored this Court's recent decision in *Gilbert v. Homar*, 117 S. Ct. 1807 (1997). In denying qualified immunity on Lickiss' First Amendment claim, the court of appeals held that Lickiss did not occupy a position of trust because he enjoyed merit commission protections which required cause for disciplinary actions. Over the dissent of two judges, Drexler and Hodgson's Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied by the Seventh Circuit on June 30, 1998. (App. 7-8).

REASONS FOR GRANTING THE WRIT

I.

The Court Of Appeals Abdicated Its Obligation To Independently Determine The Content And Scope Of The First Amendment When It Concluded, Solely On The Basis Of The Plaintiff Sheriff's Sergeant's Civil Service Status, That The Plaintiff Did Not Occupy A Position Of Trust Within The Sheriff's Department, In Conflict With The Approach Mandated In *Branti v. Finkel*, 445 U.S. 507 (1980), And With Decisions From The First, Third, Fourth, And Sixth Circuits[3]

The duties performed by Illinois deputy sheriffs entail sufficient input into the Sheriff's policymaking function that the Seventh Circuit Court of Appeals has labeled them "confidential" employees[4] who may be terminated for political reasons. *Upton v. Thompson*, 930 F.2d 1209, 1213-16 (7th Cir. 1991), *cert. denied*, 503 U.S. 906 (1992).[5] An Illinois sheriff need not tolerate political

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[3] The Seventh Circuit's decision conflicts with *Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7 (1st Cir. 1996), *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986); *McCrerey v. Allen*, 118 F.3d 242 (4th Cir. 1997), and *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990).

[4] The use of the terms "confidential" or "policymaking" employees is technically inaccurate, but commonly applied for convenience sake. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court emphasized that the proper focus is on whether the position is one for which political affiliation is an appropriate requirement, and that designations such as "confidential" or "policymaking" are merely relevant factors in the calculus.

[5] The federal courts of appeals are divided on the question of whether deputy sheriffs occupy positions for which political affiliation is an appropriate requirement. *Compare Upton*, 930 F.2d 1209, *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989)

(continued...)

disloyalty from her deputies because the sheriff depends almost entirely upon those deputies to implement her political and law enforcement agendas. Because deputies frequently work autonomously, they enjoy wide latitude and discretion in the performance of their duties and in the implementation of department goals. *Id.* at 1215. They are, therefore, particularly well positioned to either promote or sabotage the sheriff's political and law enforcement agendas.

A sheriff's right to count on the loyalty of her deputies is not diminished, indeed it is enhanced, when the deputy ventures beyond mere political party membership into public criticism of his employer. For that reason, the Seventh Circuit has applied *Branti*'s confidential employee exception with full force to the line of cases involving retaliation against speech on matters of public concern. *See Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993). In support of that extension, Judge Posner reasoned in *Wilbur* that "[i]t would be a strange rule that gave more job protection to policymaking employees who vociferously attack their superiors than to policymaking employees who do their best to serve

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[5] (...continued)
(to say that sheriffs may not demand political loyalty from their deputies is "beyond the bounds of common sense"), *and Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997) (deputy sheriffs are policymakers and are the alter ego of the sheriff), *cert. denied*, 118 S. Ct. 881 (1998), *with Matherne v. Wilson*, 851 F.2d 752, 761 (5th Cir. 1988) (deputy sheriffs may not be terminated for political disloyalty), *Burns v. County of Cambria*, 971 F.2d 1015, 1023 (3d Cir. 1992) (deputies occupy nonpolicymaking positions), *cert. denied*, 506 U.S. 1081 (1993) *and Francia v. White*, 594 F.2d 778, 782 (10th Cir. 1979) (deputies are nonconfidential, nonpolicymaking employees).

those superiors faithfully but have the misfortune to belong to the wrong party. It would give policymaking employees and other sensitive employees an incentive to attack their bosses in order to retain their jobs." *Id.* at 219. *See also Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995) (stating that the "patronage policymaker exception is also applicable to the *Pickering*[6] analysis").[7]

Notwithstanding these principles, the lower court denied the Defendants, the former and current sheriffs of Tazewell County, Illinois, qualified immunity on a

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[6] *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), require the courts to balance individual versus governmental interests in determining whether a public employee may be disciplined for speaking out on matters of public concern.

[7] The federal courts of appeals disagree as to whether the *Branti* exception should apply to *Connick/Pickering* cases. While only the Seventh Circuit has adopted a wholesale *Branti* exception for such cases, the First and Ninth Circuits have indicated in *dicta* that a *Branti* exception for *Connick/Pickering* claims may be cognizable. *See, e.g., Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir. 1998) (where employee is subject to termination for political reasons under *Branti*, employer may consider employee's views on department matters in deciding whether to terminate employee); *Fazio v. City and County of San Francisco*, 125 F.3d 1328, 1332 (9th Cir. 1997) (First Amendment speech claims of policymakers are analyzed under rubric of *Elrod/Branti*), *cert. denied*, 118 S. Ct. 1517 (1998). In contrast, the Second and Eleventh Circuits have refused to recognize a *Branti* exception for *Connick/Pickering* claims. *See, e.g., McEvoy v. Spencer*, 124 F.3d 92, 102 (2d Cir. 1997) (employees' policymaking status is not dispositive, though it weighs very heavily, in *Connick/Pickering* analysis); *Cutliffe v. Cochran*, 117 F.3d 1353, 1358 (11th Cir. 1997) (*Pickering* analysis required if employee engaged in expressive conduct beyond manifesting political affiliation), *cert. denied*, 118 S. Ct. 1795 (1998).

First Amendment claim alleging that an Illinois deputy sheriff, indeed a sergeant within the sheriff's department, was disciplined on account of his report to the local state's attorney concerning a fellow deputy's alleged misconduct. The Plaintiff sergeant's continued investigation of his fellow deputy and his subsequent report to the state's attorney were both indisputably in direct contravention of the Sheriff's orders. The lower court justified this result solely on the grounds that Sergeant Lickiss did not qualify as a "confidential" employee within the meaning of the First Amendment because the County of Tazewell had granted him civil service protections. (App. 5). Significantly, the County's grant of civil service protections to the Plaintiff in no way altered the Plaintiff's statutory duties, which, as described above, had already been held sufficiently confidential in nature to render Illinois deputy sheriffs exempt from the First Amendment protections set forth in the *Elrod*[8]*/Branti* and *Connick/Pickering* lines of cases. *See Upton, supra*, 930 F.2d at 1215; *Wilbur, supra*, 3 F.3d at 219.

The court of appeals' reasoning is problematic in important respects. First, it has created a conflict among the circuits as to whether state civil service systems can, by themselves, expand the First Amendment protections of public employees who otherwise would be left to their remedies at state law. By and large, the courts of appeals in such cases have adhered to the principle, perhaps best expressed in *McCrerey v. Allen*, 118 F.3d 242, 244 (4th Cir. 1997), that a state law prohibiting consideration of political affiliation for a par-

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[8] *Elrod v. Burns*, 427 U.S. 347 (1976).

ticular position would not control a First Amendment analysis because "the content and scope of federal constitutional rights are matters of federal constitutional law." Accordingly, while the courts of appeals have properly recognized that a state's grant of civil service status can create due process entitlements in public employees, they have rejected the contention that such protections simultaneously expand First Amendment protections which would otherwise be unavailable to the employee because of her confidential or policymaking status in the government hierarchy.[9] *See Ortiz-Pinero v. Rivera-Arroyo*, 84 F.3d 7, 16 (1st Cir. 1996) ("State laws identifying government positions as 'trust' or 'confidential' are not dispositive of the federal law question whether a particular position is 'political'" within the meaning of *Elrod/Branti*); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney who adequately alleged state law claim for breach of contractual "good cause" limitation on discharge could nonetheless be terminated for political reasons without violating the First Amendment); *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986) (holding that plaintiff had no First Amendment claim under *Elrod/Branti* even though she stated a due process claim that she was terminated without cause).

This more cautious view of the impact of state civil service protections on the scope of an employee's First

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[9] The only Seventh Circuit decision to address whether state civil service protections can control a *Branti* analysis easily rejected the proposition. *See Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307, 1310 (7th Cir.), *cert. denied*, 464 U.S. 916 (1983). The lower court in the instant case did not discuss its prior decision in *Shakman*.

Amendment rights has several distinct advantages over the approach taken by the Seventh Circuit in the instant case. From a practical viewpoint, it minimizes repetitive litigation by insuring that a state's grant of civil service protections will not give an otherwise remediless public employee two separate opportunities to litigate his discipline.[10] The instant case provides an excellent example of the pitfalls inherent in the court of appeals' approach. If he were noncivil service, the Plaintiff would have been without any right to challenge his discipline. As an at-will employee, no state law discharge claim would be cognizable. As a confidential employee (*see Upton, supra*, 930 F.2d at 1215), his First Amendment claim would have been foreclosed. *See Wilbur*, 3 F.3d at 219. Under the lower court's ruling, however, the County of Tazewell's grant of civil service protections to Plaintiff earned him not only a comprehensive arbitration hearing at which his objections to his suspension and demotion were extensively litigated and rejected, but also afforded him a second opportunity to contest his discipline in federal court under the First Amendment.

In addition to the practical problem presented by superimposing a second layer of litigation on top of the state's comprehensive arbitration process, the lower court's reliance on the Plaintiff's civil service status to expand his First Amendment rights lacks any sound constitutional grounding. In *Branti* this Court empha-

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[10] This Court has rejected the contention that principles of *res judicata* apply to civil rights claims arising out of disputes which were previously litigated in arbitration hearings. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

sized that the determination of whether an employee occupies a position of trust must focus on the nature of the duties and responsibilities of a particular position. *Branti v. Finkel*, 445 U.S. 507, 517-19 (1980). The *Branti* Court did not suggest that a state's grant of civil service protections would alter the analysis. Since *Branti*, the courts of appeals have uniformly assessed the scope of the exception by focusing on the duties inherent in a particular position. *See, e.g., Wrigley v. Greanias*, 842 F.2d 955 (7th Cir.), *cert. denied*, 488 U.S. 850 (1988); *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 881 (1998); *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997). If the nature and scope of a deputy's duties qualify the position as confidential under *Branti* (*see Upton*, 930 F.2d 1209), then simply anointing the position with civil service protections, without altering or diminishing the deputy's job duties, offers no constitutionally principled basis upon which to redesignate the position as nonconfidential for purposes of a First Amendment analysis.

Only by collapsing the First Amendment analysis with the due process analysis was the lower court able to square its conclusion that Plaintiff occupied a nonconfidential position with applicable precedent. The lower court held that the Plaintiff's civil service status simultaneously vested Plaintiff with both due process and First Amendment rights, and thus federally enforceable rights to both state and federal fact finding on the propriety of his discipline. Specifically, the court of appeals stated that, because Plaintiff "was neither a confidential employee nor a policymaker," he was entitled to due process guarantees of a "pre-suspension hearing, prior notice of suspension, an opportunity to

respond and notice of the charges against him." (App. 5). However, whether Plaintiff was a "confidential employee [or] policymaker" should have been irrelevant, as a matter of constitutional law, to his due process right to a hearing. Principles of due process were implicated solely because of Plaintiff's status as a merited civil servant, and the corresponding state created property interest in employment. *See Board of Regents v. Roth*, 408 U.S. 564 (1972).

Conversely, the Seventh Circuit also concluded that, because Lickiss was a merited deputy for whom "cause was required" for discipline, he was entitled to the protections of the First Amendment in raising matters of public concern with the state's attorney. (App. 5-6). Once again, however, Plaintiff's entitlement to merit commission protections should have driven only the due process, but not the First Amendment, analysis. The First Amendment analysis should have focused on the Plaintiff's job duties, an inquiry which was notably absent from the lower court's analysis.

Allowing state civil service laws to dictate the *Branti* analysis will also create perverse inconsistencies and distortions within the individual states, a point well illustrated here. Under *Upton* and *Wilbur* even the lowest level Illinois deputy sheriff may be terminated for his politics or speech without offending the First Amendment. However, under the lower court's decision, once civil service protections exist, the First Amendment protects identical conduct, even by the most senior supervisory personnel, and protects them not only from termination, but from demotion, suspension, or any form of discipline. Indeed, in the present case the Plaintiff was a sergeant within the sheriff's depart-

ment with concomitant supervisory responsibilities. It turns *Branti* on its head to interpret the First Amendment as requiring a sheriff to tolerate in her top supervisors disloyalty which would warrant the termination of noncivil service deputies having far less input into the sheriff's policymaking function.

The Seventh Circuit's deferential approach essentially abdicates the federal courts' obligation to determine the content and scope of federal constitutional rights. The *Elrod/Branti* and *Connick/Pickering* lines of authority are intended to prohibit the states from disciplining certain, but not all, public employees for their political beliefs or speech. If the states can determine which employees enjoy First Amendment protections through civil service designation, then the federal protections flowing from those lines of cases becomes illusory. This point is illustrated equally whether the federal court defers totally to the states' designation of a position as confidential, or conversely, where it completely accedes to the states' designation of a position as nonconfidential. In either case, the failure to analyze the responsibilities inherent in a particular position, as required under *Branti*, defeats the very purpose of federal review.

In the present case, the County of Tazewell's grant of civil service protections to its deputy sheriffs did not, in any fashion, alter the duties statutorily imposed upon individuals occupying that position. Civil service or not, Illinois deputy sheriffs are statutorily accorded specific duties which render them confidential employees within the meaning of the First Amendment. *Upton*, 930 F.2d at 1215. Indeed, the Plaintiff in this case was a sergeant with supervisory duties, which, under *Branti*,

should have lessened his First Amendment rights rather than heightened them.

In light of the foregoing, the Court should grant *certiorari* to resolve the inter-circuit conflict as to the impact of civil service status on a *Branti* analysis and to clarify the factors governing the appropriate analysis to be applied by the federal courts in determining whether a particular position is one for which undivided loyalty is an appropriate requirement.

II.

In Concluding That Plaintiff's Civil Service Protections Qualified Him As a Nonconfidential Employee Under *Branti*, The Seventh Circuit Deprived Defendants Of Any Consideration Of Their Claim To Qualified Immunity On Plaintiff's First Amendment Claim By Failing To Determine Whether Plaintiff's Status As a Nonconfidential Employee Was Clearly Established

Governmental officials should not face liability under § 1983 unless the law is sufficiently established that it puts the official on notice that his conduct would violate the plaintiff's constitutional rights. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court recognized that qualified immunity shields "governmental officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Five years later, in *Anderson v. Creighton*, 483 U.S. 635, 639-41 (1987), this Court addressed the "level of generality at which the relevant 'legal rule' is to be identified" and held that qualified immunity would apply

unless the constitutional right at stake was clearly established in a fact-specific particularized sense rather than merely in a general sense.

In the present context, qualified immunity insulates a governmental official who unconstitutionally terminates a nonconfidential employee in violation of the employee's First Amendment rights unless it was clearly established that the employee did not occupy a position of trust. *Wrigley v. Greanias*, 842 F.2d 955, 958 (7th Cir. 1988); *see also Wilbur*, 3 F.3d 214 (holding that *Elrod/Branti* confidential employee exception applies to free speech as well as free association claims). Similarly, even the unconstitutional termination of an obviously nonconfidential employee who spoke out on matters of public concern is subject to qualified immunity unless it was clearly established under the circumstances that the employee's interest in speaking outweighed the government's countervailing interests. *Rakovich v. Wade*, 850 F.2d 1180, 1208-13 (7th Cir.) (*en banc*), *cert. denied*, 488 U.S. 968 (1988).

A. The Seventh Circuit Overlooked Its Own Precedent Establishing the Confidential Status of Deputy Sheriffs and Instead Concluded, Without Citation to Authority, That it Was Clearly Established That Respondent's Civil Service Protections Afforded Him a Nonconfidential Employment Status

In contravention of *Anderson*'s requisite particularized analysis of the law, the Seventh Circuit failed to consider Defendants' contention that it was not clearly established that Plaintiff was a confidential employee who could automatically be terminated for either his

political beliefs or his speech without offending the First Amendment. *See Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995); *Wilbur*, 3 F.3d at 219. If the lower court had addressed that question, it could not have concluded that Plaintiff's right not to be disciplined was clearly established for purposes of defeating Defendants' qualified immunity defense.

Five decisions decided by the Seventh Circuit from 1991 through the time of Plaintiff's discipline in 1994 reaffirmed that deputy sheriffs were confidential employees who could automatically be terminated for either their political beliefs or their speech without offending the First Amendment. *See Mitchell v. Thompson*, 18 F.3d 425 (7th Cir.), *cert. denied*, 513 U.S. 870 (1994); *Heideman v. Wirsing*, 7 F.3d 659 (7th Cir. 1993); *Dimmig v. Wahl*, 983 F.2d 86 (7th Cir.), *cert. denied*, 510 U.S. 861 (1993); *Wilbur*, 3 F.3d 214 (speech); *Upton* 930 F.2d 1209 (political beliefs). None of those five decisions or any other case from the Seventh Circuit had held that a different result would obtain simply because the deputy enjoyed civil service protections. The most that the Seventh Circuit had done was to suggest in *Upton* and *Wilbur* that its analysis was simplified because the deputy sheriffs in those cases did not enjoy civil service protections. *Wilbur*, 3 F.3d at 219; *Upton*, 930 F.2d at 1217, n.5. The only case in which the Seventh Circuit had specifically considered the impact of civil service protections on the *Elrod/Branti* analysis was *Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir.), *cert. denied*, 464 U.S. 916 (1983). In *Shakman* the court expressly rejected the contention that civil service protections controlled a determination of wheth-

er the plaintiff's position was confidential and, therefore, exempt from the protections of *Elrod/Branti*. *Id.* at 1310.

Not only did the lower court fail to explain how Plaintiff's civil service protections could trump the holdings of its own foregoing cases, it similarly did not consider cases from other circuits which were cited by Defendants for the proposition that civil service protections do not control whether an employment position is confidential for purposes of an *Elrod/Branti* analysis. *See, e.g., McCrerey v. Allen*, 118 F.3d 242 (4th Cir. 1997); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Brown v. Trench*, 787 F.2d 167 (3d Cir. 1986).

B. The Seventh Circuit's Generalized Inquiry Caused it to Likewise Err in its Application of the *Connick/Pickering* Balancing Test

The Seventh Circuit's failure to conduct a particularized analysis of the confidential employee issue caused it to erroneously analyze the constitutionality of Plaintiff's discipline under the fact-intensive *Connick/Pickering* balancing test. However, even if the court of appeals was correct in applying *Connick/Pickering*, it nonetheless failed to consider Defendants' qualified immunity defense.

In *Rakovich v. Wade*, 850 F.2d 1180, 1213 (7th Cir.) (*en banc*), *cert. denied*, 488 U.S. 968 (1988), the Seventh Circuit explicitly recognized the broad application of qualified immunity to cases involving the *Pickering* balancing test and noted that before a defendant official may face liability, the facts of the existing case

law must correspond closely to the facts at hand. Notwithstanding that reasoning, the lower court never addressed whether it was clearly established, under prevailing case law, that Plaintiff's right to report information to the state's attorney concerning Deputy Steinborn outweighed the sheriff's countervailing right to maintain discipline and respect for orders.[11] This omission was particularly noteworthy because Sheriff Drexler explicitly ordered Lickiss not to conduct any further investigation and to treat the matter confidentially, and that she was requesting an outside agency, the Illinois State Police, to investigate the matter.[12]

Plaintiff's decision to ignore this order and continue to conduct his own investigation without advising his employer created an overriding issue of insubordination. Similarly, Lickiss' decision to deliver a report of his investigation to the state's attorney, behind the Sheriff's back, and his apparent decision to discuss the matter with the media,[13] also constituted insubordination. The Seventh Circuit, however, bypassed the issue of insubordination when it held, in reliance on two

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[11] Defendants never disputed that, absent a direct order to the contrary, Plaintiff possessed the right to inform the state's attorney about matters uncovered during an investigation.

[12] The state police declined Sheriff Drexler's request. (R. 92, Ex. 5 at 46).

[13] Lund and others told Sheriff's investigators that Lickiss was working with a local reporter on his story, though Lickiss denied this was true. (R. 92, Ex. 33; Ex. 34; Ex. 41 at 8).

cases that did not involve insubordination,[14] that Plaintiff had a clearly established right to ignore Sheriff Drexler's order.

The lower court's failure to address the insubordination issue was particularly puzzling, given its previous recognition that decisionmakers possess the right to "punish thirteenth-hour efforts to undermine their authority and disrupt the functioning of their offices by subordinates seeking to undercut final decisions with which they disagree." *Wright v. Ill. Dept. of Children and Family Servs.*, 40 F.3d 1492, 1504 (7th Cir. 1994). *See also Campbell v. Towse*, 99 F.3d 820 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1254 (1997); *Domiano v. Village of River Grove*, 904 F.2d 1142, 1146 (7th Cir. 1990) (holding that refusal to follow ordinance, despite commendable motivation, constituted insubordination justifying dismissal). Not only did the lower court not consider Lickiss' insubordination in the *Connick/Pickering* balancing process, it did not explain how the above-cited cases were inapplicable.[15]

As the foregoing illustrates, the Seventh Circuit ignored this Court's requirement that a particularized analysis be conducted before a constitutional right may

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[14] The Seventh Circuit relied upon *Glass v. Dachel*, 2 F.3d 733 (7th Cir. 1993), and *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984).

[15] Moreover, the Seventh Circuit's broad conclusion that the sheriff could not preclude Plaintiff from providing information to the state's attorney ignored the fact that a county sheriff's office is entirely separate from the state's attorney's office, although the two must obviously cooperate in many ways. Under Illinois law a sheriff is entitled to control all of the internal operations of her office as she sees fit. 55 Ill. Comp. Stat. 5/3-6018.

be deemed clearly established for purposes of public official liability under § 1983. This approach impermissibly deprived Defendants of a fair consideration of their claim to qualified immunity. The failure to undertake the requisite analysis sets a precedent which will curtail the right of public officials to rely on the defense of qualified immunity in cases where it was not apparent that a particular course of conduct might later be deemed constitutionally impermissible. Accordingly, this Court should grant *certiorari* on Petitioners' claim to qualified immunity on Respondent's First Amendment free speech claim.

III.

The Court Of Appeals' Conclusion That Principles Of Due Process Entitled The Plaintiff Sheriff's Sergeant, Who Was Suspended Without Pay For Twelve Days, To a Presuspension Hearing, In Addition To a Pretermination Hearing, Contravened This Court's Decision In *Gilbert v. Homar*, 117 S. Ct. 1807 (1997)

"'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Mathews*, 424 U.S. at 334 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). To determine what process is due, this Court has instructed that three primary factors be balanced: "First, the private interest that will be effected by the official actions; second, the risk of an erroneous depri-

vation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest." *Mathews*, 424 U.S. at 335.

In the context of public employment, no process is due unless a public employee first establishes that he enjoys a property interest in employment, a threshold not in dispute here.[16] *Board of Regents v. Roth*, 408 U.S. 564, 576-78 (1972). Once a property interest is present, principles of due process require the government to provide a predeprivation hearing before terminating public employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).[17]

While the right to a pretermination hearing has long been established by this Court (*see Loudermill*), a public employee's right to a presuspension hearing was recently addressed by this Court for the first time in *Gilbert v. Homar*, 117 S. Ct. 1807, 1811 (1997). In *Gilbert* this Court announced that failure to provide a presuspension hearing did not violate the due process rights of a tenured public employee who was charged with a felony, so long as he received a sufficiently prompt postsuspension hearing. *Id.* at 1812-14.

Here the Seventh Circuit faulted Defendants for failing to provide Lickiss with a presuspension hearing. Without any analysis or discussion of the *Mathews* fac-

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[16] Defendants have not contested that Plaintiff's merit commission protections afforded him a property interest in his position.

[17] There is no issue here with respect to the adequacy of pretermination process, as the government undisputedly complied with *Loudermill*'s pretermination hearing requirement.

tors or of *Gilbert*, the Seventh Circuit concluded that under its decision in *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975), Lickiss was entitled to "a pre-suspension hearing, prior notice of suspension, notice of the charges against him, and an opportunity to respond." (App. 4-5). *Muscare*, however, provided no basis for so holding, given that in *Ciechon v. City of Chicago*, 634 F.2d 1055, 1059-60 n.12 (7th Cir. 1980), the Seventh Circuit specifically noted that this Court's decision in *Barry v. Barchi*, 443 U.S. 55 (1979), overruled *Muscare* on the issue of entitlement to a presuspension hearing. In *Barry* this Court held that a statute authorizing summary suspensions of harness racing trainers without a presuspension hearing did not affront the due process clause. 443 U.S. at 63-66.

The Seventh Circuit's decision should not stand because all of its decisions and this Court's decisions in *Gilbert* and *Barry* contravene the conclusion that principles of due process entitled Plaintiff to a pre-suspension hearing, in addition to a pretermination hearing. Indeed, not a single post-*Barry* decision has concluded that principles of due process were violated by the suspension of an employee without a hearing, so long as a pretermination hearing was supplied and a full panoply of post-termination procedures were available. *See Gilbert*, 117 S. Ct. 1807 (holding that a police officer charged with a felony was not entitled to a presuspension hearing so long as he received a sufficiently prompt postsuspension hearing, because, *inter alia*, his lost income was relatively insubstantial, in contrast to a termination situation); *Jones v. City of Gary, Ind.*, 57 F.3d 1435 (7th Cir. 1995) (upholding suspension of insubordinate firefighter where presus-

pension hearing not afforded); *Swanson v. Village of Lake in the Hills*, 962 F.2d 602, 604 n.2 (7th Cir. 1992) (noting that "[t]here is support for the argument that [plaintiff] could have been suspended without a predeprivation hearing); *Panozzo v. Rhoads*, 905 F.2d 135 (7th Cir. 1990) (upholding suspension without prior hearing of insubordinate police officer who had failed to make scheduled court appearances and show up for work one day); *Ciechon*, 634 F.2d 1055 (holding that no presuspension hearing was required for a fireman charged with a residency violation).

In *Gilbert* this Court emphasized that "[u]nlike the employee in *Loudermill*, who faced termination, respondent faced only a temporary suspension without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not affected at all." 117 S. Ct. at 1813. As in *Homar*, Lickiss' suspension resulted in only a twelve-day loss of salary before he was provided an opportunity to be heard. On the other hand, the employer's interest in promptly removing an employee who was blatantly insubordinate, and reasonably viewed as a participant in a scheme to publicly discredit his boss in the media, was substantial. Lickiss was suspended on October 19, 1994, provided an opportunity to be heard on October 31, 1994, and terminated one month later on November 28, 1994 (R. 92, Exs. 44, 46, 48). Following his termination, Lickiss was afforded a full trial-like arbitration hearing which lasted several days. Principles of due process required no more. The Seventh Circuit's contrary conclusion is at odds with this Court's

analysis in *Gilbert*, and therefore, *certiorari* should be granted to ensure adherence to this Court's precedent.

IV.

In Holding That The Plaintiff's Right To a Presuspension Hearing Was Clearly Established, The Court Of Appeals Relied Solely On An Overruled Decision From 1975 And Failed To Consider This Court's Decision In *Gilbert v. Homar*, 117 S. Ct. 1807 (1997), Thereby Depriving Defendants Of Fair Consideration Of Their Claim To Qualified Immunity On Plaintiff's Due Process Claim

Even if the Seventh Circuit correctly concluded that a presuspension hearing was required, it failed to conduct a particularized analysis to determine whether the law on this issue was sufficient to meet this Court's conception of clearly established law. *See Anderson*, 483 U.S. at 639-41. Not only did the court of appeals fail to conduct a particularized analysis of the law, it appears to have foregone an analysis of any sort.

The lower court's denial of qualified immunity wholly contravened the available precedent from this Court and the Seventh Circuit. In contrast to the pretermination context, the law is far from clearly established as to whether a suspension without pay requires a predeprivation hearing in the present context. As discussed *supra*, just last year this Court first addressed "whether the protections of the Due Process Clause extend to discipline of tenured public employees short of termination." *Homar*, 117 S. Ct. at 1811. Similarly, the Seventh Circuit had never decided that *Loudermill* requires the government to provide employees with a pre-

suspension hearing.[18] To the contrary, the Seventh Circuit's most analogous decisions have all reached a contrary conclusion. *See* cases cited *supra* in Part III.

As in the First Amendment context, application of principles of due process in the present context requires a delicate balancing of interests which is difficult for the courts, let alone public officials unschooled in the governing legal principles. Here governing precedent would not have guided a public official to the conclusion that a suspension without pay violated due process when a prompt postsuspension opportunity to be heard was provided twelve days later, and that opportunity was followed by a full trial-like arbitration proceeding.

The Seventh Circuit erroneously relied solely on an overruled decision in announcing that it was clearly established that Lickiss was entitled to a presuspension hearing, in addition to the pre- and post-termination process he indisputably received. All relevant authority is inconsistent with the court of appeals' determination that Lickiss' entitlement to a presuspension hearing was clearly established. Consequently, this Court should grant *certiorari* on Petitioners' claim to qualified immunity on Respondent's due process claim.

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[18] As noted *supra*, the only case relied on by the Seventh Circuit (*Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975)) was decided ten years before *Loudermill* and was noted by the Seventh Circuit itself to have been overruled by *Barry v. Barchi*, 443 U.S. 55 (1979). *See Ciechon v. City of Chicago*, 634 F.2d 1055, 1059-60 n.12 (7th Cir. 1980).

CONCLUSION

For the foregoing reasons, Petitioners Mary Drexler and Ralph Hodgson respectfully submit that the Petition for a *Writ of Certiorari* should be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-2818

ROBERT LICKISS,

Plaintiff-Appellee,

v.

MARY DREXLER, formerly the Sheriff of Tazewell County, and RALPH HODGSON, Sheriff of Tazewell County,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois.
No. 95 C 1121—**Michael M. Mihm**, *Chief Judge.*

ARGUED FEBRUARY 10, 1998—DECIDED APRIL 21, 1998

Before CUMMINGS, COFFEY and MANION, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In his amended complaint filed in January 1996, Robert Lickiss sued Mary Drexler, former Sheriff of Tazewell County, Illinois, and her successor, Ralph Hodgson. Plaintiff alleged that he was hired by the County of Tazewell as a deputy sheriff in January 1983 and promoted to sergeant in September 1988. In July 1994 he received a complaint that Deputy Sheriff Michael Steinborn was then engaged in misconduct by "spending hours with his girlfriend or looking for her" and threatening himself and another person with a gun while off duty but in uniform. After receiving the complaint against Steinborn, plaintiff interviewed witnesses and took

statements from them and reported his findings to then-Sheriff Drexler and then-Chief Deputy Hodgson. Drexler instructed Lickiss to stop investigating Steinborn. Thereafter Drexler gave Steinborn two weeks off with pay and instructed him to seek counseling.

In September 1994 plaintiff was contacted by individuals who informed him that they wished to press charges against Steinborn because they were fearful for their safety and that of their family. Consequently Lickiss reported this matter to the State's Attorney and an Assistant State's Attorney of Tazewell County.

Lickiss alleged that Sheriff Drexler ordered "a massive investigation" of Lickiss after learning that he had disclosed information about Steinborn's activities. In October 1994 she suspended Lickiss without a hearing and without pay for an indefinite period while she "falsely publicly accused him of violating federal and state laws." According to plaintiff, his suspension was in retaliation for his disclosure of the misconduct of Deputy Sheriff Steinborn. Eight days later, Drexler sent Lickiss a letter confirming his suspension and advising him of her intent to terminate him. A month thereafter she notified plaintiff that she had terminated his employment. This action was two days before defendant Hodgson became Sheriff. Lickiss' termination was allegedly in retaliation for disclosing the misconduct of Deputy Sheriff Steinborn.

On February 27, 1995, Sheriff Hodgson reinstated plaintiff as a deputy sheriff after a two-week unpaid suspension and after his demotion from sergeant to deputy sheriff. According to plaintiff, the charges against him by Drexler and Hodgson were false and made to cover up Steinborn's actions and to punish plaintiff for not participating in the cover-up. In Count I of his complaint, plaintiff alleges that his termination for investigating fellow police officer Steinborn and reporting that information to the Tazewell County State's Attorney violated his First Amendment rights. In Count II, plaintiff claims that defendants deprived him of due process of law by compensating him at

a deputy's rate of pay rather than a sergeant's rate during the period of his suspension. In closing, the plaintiff asked the court to reinstate him to his former position and rank without penalty and to expunge any adverse employment records. Lickiss sought $2 million in compensatory damages and another $2 million in punitive damages.

In December 1996 defendants filed a motion for summary judgment on Count I, claiming that their "interest in maintaining discipline, loyalty, confidentiality, and respect for departmental orders, rules and regulations outweighed any right Plaintiff claims to disregard official orders in order to investigate and speak out on the matters identified in Plaintiff's complaint." In the alternative the former Sheriff and her successor asserted they were entitled to qualified immunity.

As to plaintiff's due process claim in Count II, defendants asserted that his claim was rejected by an arbitrator and that he is simply seeking review of that decision and that he was not entitled to due process prior to his suspension.

In June 1997 Judge Mihm handed down a 21-page Order denying defendants' motion for summary judgment. The order reported that during a meeting with Assistant State's Attorney Umholtz, then-Sheriff Drexler stated that Steinborn would be required to take vacation time, receive psychiatric treatment and clearance from the psychiatrist before returning to work. She asserted that she ordered plaintiff off the case and directed him to do no further investigation. She also asked the Illinois State Department of Criminal Investigations (DCI) to investigate the situation, but it refused to do so.

Judge Mihm said that despite Lickiss' understanding he was not to be involved in further investigation of Steinborn, he delivered a supplemental report regarding it to Umholtz on August 30, 1994. Lickiss reported that Julie Frakes, sister of Steinborn's former girlfriend, Kathy Lund, advised him that Steinborn continued to visit her parents'

home after being asked to stop and that they and Lund felt scared and intimidated by Steinborn. Approximately a month later Lickiss reported Mrs. Lund's September 26, 1994 interview with him about Steinborn and her alleged dissatisfaction with Sheriff Drexler's handling of the situation. A week later the *Journal Star* published an article criticizing Drexler's handling of the Steinborn-Lund matter and adding that a similar incident had occurred between Steinborn and his ex-wife. The article quoted Lickiss as one of its sources. Because he continued to investigate the Steinborn-Lund matter and leaked information to the press, Lickiss was allegedly disciplined for insubordination. He also supported the candidate opposing defendant Hodgson's successful race for Sheriff.

Judge Mihm concluded that Lickiss' communications addressed matters of public concern, thus satisfying *Pickering v. Board of Education*, 391 U.S. 563. From the materials before it, the court concluded that plaintiff produced enough evidence to create an issue of material fact for a jury regarding Drexler's actual motivation in disciplining him. The court stated that suspension with pay pending a rehearing or a pre-suspension hearing should have been accorded Lickiss and that the post-deprivation process was constitutionally insufficient. Defendants' motion for summary judgment was denied, so that plaintiff could proceed to trial with respect to his claim for damages. We agree with this disposition.

The only issue before this Court is the district court's denial of the claim of qualified immunity. "Because qualified immunity is immunity from suit, not merely a defense to liability, and effectively is lost if a case erroneously is permitted to go to trial, the denial of qualified immunity is a final appealable order for purposes of 28 U.S.C. § 1291, if based solely on a matter of law." *Khuans v. School Dist. 110*, 123 F.3d 1010, 1012 (7th Cir. 1997) (citations omitted).

Defendants failed to provide plaintiff with a pre-suspension hearing, prior notice of suspension, notice of the

charges against him, and an opportunity to respond. Therefore his clearly established due process rights were denied. *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975). The balancing test of *Pickering v. Board of Education*, 391 U.S. 563, reiterated in *Connick v. Meyers*, 461 U.S. 138, governs this case.

Lickiss was neither a confidential employee nor a policymaker. Unlike the deputy sheriff in *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993), Lickiss was not a policymaker whose enforced unpaid leave did not establish violation of his First Amendment rights. Therefore he was entitled to a pre-suspension hearing, prior notice of suspension, an opportunity to respond and notice of the charges against him. *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975).

Under *Pickering* and *Connick*, it is clear that a governmental employer cannot punish a public employee for engaging in protected expression on matters of public concern under the First Amendment. The First Amendment protection of the employee in commenting upon matters of public concern is balanced against the interest of the government as employer in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 142. Lickiss was entitled to raise questions about the shortcomings of the defendants' official investigation because it is a matter of public concern. *Glass v. Dachel*, 2 F.3d 733, 740 (7th Cir. 1993). Here defendants have been unable to advance any valid reason for their treatment of plaintiff. *Dishnow v. School Dist. of Rib Lake*, 77 F.3d 194 (7th Cir. 1996).

Applying the *Pickering* balancing test, it is apparent that Lickiss was not a confidential employee or policymaker, and defendants have been unable to show that plaintiff occupied that position. Unlike confidential employees or policymakers, Lickiss was hired and promoted by a Merit Commission and not under patronage. Under the applicable collective bargaining agreement, cause was required for demotion or adverse employment action, and a grievance process was provided. Unlike then-Chief Deputy Hodgson,

plaintiff was not a confidential policymaker and indeed was excluded from meetings where defendants considered the Steinborn matter. As in *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984), Lickiss could not be disciplined for bringing matters of public concern to the attention of the State's Attorney. As in that case, plaintiff's calling the Steinborn matter to the attention of the State's Attorney was deserving of First Amendment protection. See also *Glass v. Dachel*, 2 F.3d 733 (7th Cir. 1993); *Gorman v. Robinson*, 977 F.2d 350 (7th Cir. 1992); *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976).

As the State's Attorney told Drexler, Lickiss had the duty to report the Steinborn information to him. Under the facts of record defendants' claim of qualified immunity cannot succeed. Their motion for summary judgment was properly denied. Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 30, 1998

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

ROBERT LICKISS,	]	Appeal from the
	]	United States District
Plaintiff-Appellee,	]	Court for the Central
	]	District of Illinois.
No. 97-2818 *vs.*	]	
	]	No. 95 C 1121
MARY DREXLER, formerly	]	
the Sheriff of Tazewell County,	]	Michael M. Mihm,
and RALPH HODGSON,	]	*Chief Judge*.
Sheriff of Tazewell County,	]	
	]	
Defendants-Appellants.	]	

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendants-appellants on May 5, 1998, and the answer filed by

plaintiff-appellee, all of the judges on the original panel voted to deny rehearing and a majority of the active judges voted to deny rehearing en banc.* Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Judge Ilana Diamond Rovner and Judge Diane P. Wood voted to grant rehearing en banc.

[Filed June 17, 1997]

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

ROBERT LICKISS,	)	
	)	
Plaintiff,	)	
v.	)	No. 95-1121
	)	
	)	
COUNTY OF TAZEWELL, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is now before the Court on Defendants' Motion for Summary Judgment. For the reasons set forth below, the Motion for Summary Judgment [#90] is DENIED.

FACTUAL BACKGROUND

For 12 years, Plaintiff, Robert Lickiss ("Lickiss"), was employed by the Tazewell County Sheriff's Department. According to Lickiss, he was an excellent employee and never received any disciplinary action during his tenure with the Sheriff's Department prior to the incident in question. Defendant Mary Drexler ("Drexler") was the Sheriff of Tazewell County until November 1994, when Defendant Ralph Hodgson ("Hodgson") won the election.[1]

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[1] Lickiss did not support Hodgson in his bid to be elected Sheriff.

In July 1994, Lickiss learned of another deputy sheriff's allegedly "gross misconduct" while off duty. Lickiss conducted an investigation of this officer, Michael Steinborn ("Steinborn"), and reported his findings to Drexler. Drexler purportedly told Lickiss to cease his investigation.[2] Later that fall, Lickiss purportedly received another complaint regarding Steinborn and contacted the State's Attorney for Tazewell County to inform him of the complaint. Upon learning that Lickiss had divulged this information to the State's Attorney, Drexler allegedly launched a "massive investigation" regarding Lickiss' conduct. On October 19, 1994, Drexler suspended Lickiss without pay for an indefinite period of time. On November 28, 1994, Drexler informed Lickiss of her decision to terminate his employment with the Tazewell County Sheriff's Department. On February 27, 1995, newly-elected Sheriff Hodgson reinstated Lickiss, converting his discipline to a ten-day suspension without pay and demotion from sergeant to patrol deputy. Issues relating to Hodgson's determination of the appropriate discipline were submitted to arbitration.

Lickiss filed this action pursuant to 42 U.S.C. §§ 1983 and 1988 on March 17, 1995. His First Amended Complaint ("Complaint") was filed on January 10, 1996. In Count I, Lickiss alleges that he was terminated in violation of his First Amendment rights for investigating a fellow police officer and reporting that information to the Tazewell County State's Attorney. Count II asserts a due process violation, in that Lickiss claims he should have received compensation at a sergeant's rate of pay

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[2] Steinborn had apparently supported Hodgson's campaign.

during the term of his suspension. Defendants have now moved for summary judgment on Count I of the Complaint, asserting that their interest in maintaining discipline, loyalty, confidentiality, and respect for departmental orders, etc., outweighed any right Lickiss claims to have regarding the actions he took. In the alternative, Defendants Hodgson and Drexler assert that they are entitled to qualified immunity. Defendants also seek summary judgment with respect to Count II of the Complaint, asserting that the issue of Lickiss' entitlement to receive compensation at a sergeant's rate during his suspension has already been determined by an arbitrator and that he was not entitled to due process prior to his suspension.

DISCUSSION

A motion for summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the responsibility of informing the Court of portions of the record or affidavits that demonstrate the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552 (1986). The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 2553. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir. 1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex Corp.*, 106 S.Ct. at 2553. This Court must then determine whether there is a need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Anderson*, 106 S.Ct. at 2511.

I. Lickiss' First Amendment Claim

It is well established that the government cannot condition public employment on some basis that impedes an employee's constitutionally protected interest in freedom of speech. *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 2697 (1972). In other words, public employees do not forfeit their First Amendment right to comment on matters of public interest simply by virtue of the fact that they are employed by the government. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 1734 (1968). However, the government as an employer has corresponding interests in the ability to reasonably regulate the speech of its employees. *Id.* "The first amendment . . . is not a license for insubordinate speech that impedes an employee's performance of his duties or that interferes with the proper functioning of the work-place." *Domiano v. Village of River Grove*,

904 F.2d 1142, 1145 (7th Cir. 1990). Thus, the goal is to achieve "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1686 (1983), *citing Pickering*, 88 S.Ct. at 1734. Both issues (i.e., whether the speech is on a matter of public concern and the balancing of the respective interests of the parties under *Pickering*) are questions to be decided by the Court. *Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1254 (1997).

In determining whether an employee's speech involves a matter of public concern, the Court must consider "the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 103 S.Ct. at 1690. Here, in July 1994, Lickiss became involved in an investigation of the conduct of his fellow deputy, Steinborn. Steinborn had been dating Kathy Lund ("Lund"). When Lund attempted to end the affair, Steinborn allegedly began bothering Lund and her family. At one point, upon discovering Lund with another man, Steinborn purportedly began "beating himself in the head" and at one point is said to have put his service revolver to his head and threatened to kill himself. The next day, Lickiss reported this information to Defendants Drexler and Hodgson. Lickiss was instructed to prepare a written report for submission to then Assistant State's Attorney of Tazewell County, Stewart Umholtz ("Umholtz"). Umholtz has since become the State's Attorney of Tazewell County.

During a meeting with Umholtz, Drexler stated that Steinborn would be required to take vacation time, receive psychiatric treatment, and receive clearance from a psychiatrist before returning to work. At this time, Drexler asserts that she ordered Lickiss off the case and directed him to do no further investigation. Lickiss recalls only that he left the meeting with the understanding that he was not to have any further involvement in any investigation of Steinborn and that Drexler would ask the Illinois State Police Department of Criminal Investigations ("DCI") to conduct an investigation into the situation. Supported by a letter from the Tazewell County State's Attorney, Eric Blanc, Drexler requested assistance from DCI in conducting an internal investigation. However, DCI declined to investigate the Steinborn matter.[3]

Despite understanding that he was not to be involved in further investigation of Steinborn, Lickiss delivered a supplemental report regarding the Steinborn/Lund matter to Umholtz on August 30, 1994. In this report, Lickiss stated that Lund's sister had advised him that Steinborn continued to visit her parents' home after being asked to stop and that they felt scared and intimidated by him. On October 6, 1994, Lickiss prepared another report regarding a September 26, 1994 interview with Lund which detailed her version of the events involving Steinborn, as well as her alleged dissatisfaction with Drexler's handling of the situation.

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[3] The transcript of Blanc's deposition on July 24, 1996 indicates that DCI is reluctant to conduct internal investigations unless they believe criminal activity is involved. (Blanc Transcript at 7-8).

On October 14, 1994, the *Journal Star* published an article authored by Omar Sofradzija which criticized Drexler's handling of the Steinborn/Lund matter and represented that a similar incident had occurred between Steinborn and his ex-wife. Among other sources, the article quoted Lickiss directly, as well as his initial July 1994 report. Defendants contend that Lickiss was disciplined for insubordination, alleging that he continued to investigate the Steinborn/Lund matter in violation of a direct order from Drexler to cease his involvement in the investigation and that he leaked information to the press.

It is undisputed that Lickiss supported the candidate opposing Hodgson in the race for Sheriff and even drafted a letter to this candidate while on duty. While these facts could support the inference that Lickiss was motivated by personal or political reasons in pursuing the Steinborn/Lund matter in that he was attempting to indirectly discredit Hodgson, "the fact that an employee speaks at least in part for personal reasons will not automatically deprive [his] statements of the protections afforded to speech on a matter of public concern." *Cliff v. Board of School Com'rs of City of Indianapolis*, 42 F.3d 403, 410 (7th Cir. 1994); *Campbell*, 99 F.3d at 827.

The evidence establishes that the heart of the Steinborn/Lund situation involved an apparently unstable officer and the improper use of his service revolver, which would raise legitimate concerns for public safety.[4]

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[4] Defendants concede that whether Lickiss' conduct related to a matter of public concern is not properly resolvable in a

(continued...)

When viewed in the light most favorable to Lickiss, the facts also raise issues of public trust regarding the conduct of Defendants with respect to the Steinborn investigation and are such that reasonable minds could infer that the Sheriff's Department was not discharging its governmental responsibilities by conducting a thorough investigation of Steinborn. The record before the Court demonstrates that while Lickiss may have acted in part for personal or political reasons as a result of his opposition to Hodgson's candidacy, he has also set forth sufficient evidence that he desired to air the merits of the issue and address Defendants' methods of investigating an allegation that one of their officers was unstable and possibly violent towards both himself and others. Thus, one could reasonably conclude that Lickiss' communications addressed matters of public concern, and the first prong of the *Pickering* analysis is satisfied.

Additionally, in order to be protected by the First Amendment, Lickiss' "interest in expressing [himself] on this matter must not be outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Waters v. Churchill*, 114 S.Ct. 1878, 1884 (1994). The government's power to restrict speech by its employees in its mission as an employer is greater than its ability to impose restraints on public speech when acting as sovereign. *Id.*

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[4] (...continued)
motion for summary judgment. (Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 2.)

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that [he] will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain [him].

Id. at 1887-88. Thus, the Supreme Court has held that the governmental interest in restricting employee speech when it interferes with the effective and efficient achievement of its goals is substantial. *Id.* at 1888.

Defendants assert that their interest in maintaining discipline, loyalty, confidentiality, and respect for departmental orders outweighs any corresponding interest held by Lickiss. In balancing Lickiss' interest in his statements against Defendants' substantial interest in effective and efficient law enforcement, the Seventh Circuit has posed the following factors for consideration:

> (1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.

Jefferson v. Ambroz, 90 F.3d 1291, 1297 (7th Cir. 1996); *Campbell*, 99 F.3d at 829. The Court must be mindful

that one purpose of this inquiry "is to 'ensure that public employers do not use [their] authority . . . to silence discourse [on matters of public concern], not because it hampers public functions but simply because [they] disagree with the content of employees' speech.'" *Campbell*, 99 F.3d at 829, *quoting Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2899 (1987).

In this case, whether or not Drexler issued a direct order that Lickiss cease all investigation of Steinborn, it is clear Lickiss ignored his admitted understanding that he was not to pursue further investigation of the matter. His purported rationale was that Drexler was not fulfilling her responsibilities as Sheriff and was attempting to cover up misconduct in the department. Thus, it seems obvious that Lickiss' conduct would likely create problems in maintaining discipline among Drexler's subordinates and disrupt the effective functioning of the department.

Likewise, "[i]t surely cannot be doubted that individuals who work in the highest echelons of the command of a police department must be assured of the loyalty of their immediate subordinates, as these subordinates are entrusted with carrying out their orders. . . ." *Campbell*, 99 F.3d at 830. In light of Lickiss' admitted understanding that he was not to be involved in any further investigation of the Steinborn/Lund matter, the fact that Lickiss then proceeded to prepare two memoranda and a letter to another candidate in the race for Sheriff criticizing Drexler's performance and response to the situation without even mentioning his activities to Drexler could reasonably have caused Drexler to doubt Lickiss' loyalty and ability to follow orders. The newspaper article, which was partially attributed to Lickiss

and appeared to track his initial report, would only augment her doubts. Thus, Defendants' have a strong interest in being able to regulate the kind of conduct in which Lickiss engaged.

It would be unreasonable to demand complete agreement with every position taken by an employer, but "at a certain point the department's position must be set firmly if the department is to function." *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492, 1504 (7th Cir. 1994). Departmental decision makers are therefore vested with the ability to "punish thirteenth-hour efforts to undermine their authority and disrupt the functioning of their offices by subordinates seeking to undercut final decisions with which they disagree." *Id.* Thus, if Drexler actually disciplined Lickiss for disregarding her directions and attempting to undermine her authority with both the department and the public, her actions would have been justified.

However, since suspending Lickiss, Drexler has offered several rationales as justification for the discipline, some of which may be considered pretextual when considered in the entire context of the situation, and has attempted to shift the responsibility for the disciplinary decision away from herself. In the initial suspension letter dated October 19, 1994, Drexler listed the following as the bases of Lickiss' discipline: (1) unlawful release of information from an employee personnel file; (2) insubordination; (3) improper conduct while on duty; (4) cooperation in investigations; (5) criticism of employees or direct orders; (6) truthfulness; (7) intervention; and (8) political activities while on duty. The October 27, 1994 letter from Attorney Bruce Beal elaborates on these grounds, as well as violation of

department rules for failure to report information accurately, destruction of departmental records, failure to inform supervisors, failure to respect supervisors, failure to take responsible action, conduct unbecoming an officer, and failure to treat the public with courtesy.[5] Beal's letter also states that Lickiss was to have the opportunity to present his side of the story prior to final action on October 31, 1994, more than a week after the initial suspension. During her initial press conference, the only reason Drexler gave for Lickiss' suspension was that he had violated Steinborn's right to privacy by releasing information from Steinborn's personnel file in a report to the State's Attorney. This contention was later retracted. In her subsequent deposition, Drexler stated that she terminated Lickiss for violating her direct order, releasing information to the media, and engaging in political activity, among other things upon which she could not elaborate.

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[5] The letter indicates that the basis for the insubordination claim was Lickiss' reports to the State's Attorney on August 30, 1994 and September 7, 1994, as well as his contacting Lund directly. Lickiss' letter to the opposing candidate for Sheriff and alleged solicitation of a critical letter to the editor of the paper constituted the improper conduct while on duty, criticism of employees/direct orders, and political activity on duty. The charge of failure to cooperate in investigations was based on Lickiss' failure to notify Drexler of his continued involvement in the matter. The truthfulness allegation was based on his filing an allegedly false report regarding the Steinborn/Lund matter on October 11, 1994 and submitting an overtime request which purportedly misrepresented the nature of his work in order to conceal his continued involvement in the investigation. Lickiss was also charged with intervention for purportedly telling Lund to lie when questioned by departmental investigators.

There is evidence in the record that Drexler suspected at least one member of the County Board as being the source of the leak to the press, and Drexler admitted during her deposition that she had no real factual support linking Lickiss to the leaks. Furthermore, Hodgson testified that officers frequently responded to questions from reporters and sometimes used their computers for personal business without being disciplined. Hodgson then testified that he did not think that Lickiss should have been fired for composing his letter to the opposing candidate for Sheriff while on duty and did not demote him for this reason. There is also evidence in the record that Lickiss and members of the State's Attorney's office believed that Lickiss had a duty to provide further information on the Steinborn/Lund matter if he acquired such information. It is also somewhat curious that although Drexler claims that Lickiss' first supplemental report to Umholtz was in violation of her direct order to cease all investigations into the Steinborn matter, she did not verbally reprimand Lickiss or even mention it to him at that time.

State's Attorney Blanc testified in his deposition that he was troubled by the sudden shift in the departmental investigation from the conduct of Steinborn to the conduct of Lickiss. Along these lines, there is evidence in the record that Drexler treated Steinborn and Lickiss differently during their respective departmental investigations, talking to Steinborn personally prior to any disciplinary action (as was the standard department policy) and relying on his representations, while according Lickiss no such opportunity. Lickiss' statement was never taken during the investigation. Additionally, while Steinborn's conduct, which could have posed a

danger to public safety, was treated solely as an internal personnel matter, Lickiss' conduct was made the subject of a press conference. In this regard, Drexler testified to the somewhat illogical position that she considered Lickiss a greater threat to public safety than Steinborn because he could not be trusted to keep things quiet if ordered to do so.[6] Finally, Drexler confirmed that although Steinborn had done private things while on duty, some of which resulted in the initial complaint against him, he had not been disciplined for this behavior.

Furthermore, the reasonableness and extent of Defendants' pre-disciplinary investigation is also disputed, which also bears on Drexler's motivation in disciplining Lickiss. There is evidence in the record that until Lickiss' supplemental reports surfaced, Drexler was content to allow the "investigation" of Steinborn to remain idle. In fact, Drexler stated in her press conference on October 21, 1994 that she was reopening the investigation into the Steinborn case, giving rise to the inference that she considered the matter closed at that time. Members of the County Board were also critical of Drexler's handling of the situation and frustrated by her lack of responsiveness to their inquiries, which is marginally supportive of Lickiss' allegations of a cover-up.

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[6] The Court notes that Defendants' repeated attempts to downplay the potential seriousness of Steinborn's alleged instability is actually consistent with Lickiss' contention that Defendants attempted to conceal the situation and conducted a deliberately insufficient investigation.

From these facts, it would be possible to infer that Defendants were hostile to Lickiss as a result of his criticisms concerning the investigation and that the discipline he received was a result of this improper motivation rather than an attempt to maintain departmental discipline. A reasonable fact finder might therefore conclude that the disciplinary measures taken against Lickiss were in retaliation for conduct protected by the First Amendment. Thus, the Court finds that Lickiss has produced enough evidence to create an issue of material fact regarding Drexler's actual motivation in disciplining him.

Where, as here, an employer's motivation in disciplining an employee is reasonably in dispute, there remains a material issue of disputed fact that must be resolved by a jury. *Waters*, 114 S.Ct. at 1891. In resolving this issue, determinations of witness credibility, candor, and demeanor will be critical. Such determinations are not properly made by a court during summary judgment, but are the province of the jury at trial. Accordingly, Defendants' Motion for Summary Judgment with respect to Count I must be denied.[7]

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[7] As the Court finds that Lickiss has adequately raised a question about the genuineness of Defendants' motivation for his discipline, the Court cannot conclusively determine whether Defendants will be entitled to qualified immunity. *See Wright*, 40 F.3d at 1505-07; *Waters*, 114 S.Ct. at 1891. However, the law in this area is clear. If the evidence at trial demonstrates that Drexler was motivated by some improper purpose in disciplining Lickiss, then Defendants are not protected by qualified immunity. Alternatively, if the evidence establishes that Drexler was motivated only by a need to maintain discipline and effective law enforcement as she

(continued...)

II. Lickiss' Due Process Claim

The Fourteenth Amendment Due Process Clause provides: "No state . . . shall deny to any person life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Evaluating claims for the deprivation of procedural due process is a two-step process. A plaintiff must first establish a protected liberty or property interest. *Forbes v. Trigg*, 976 F.2d 308, 315 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1362 (1993). Defendants' Motion does not dispute that Lickiss may have had a constitutionally protected property interest in receiving his whole salary during the course of his employment, and, thus, that issue is conceded for purposes of their summary judgment motion.

The second question is whether the procedures provided Lickiss were constitutionally sufficient. "The essential requirements of due process . . . are notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 105 S.Ct. 1487, 1495 (1985). The Supreme Court explained that the due process clause of the Fourteenth Amendment provides that:

> The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

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[7] (...continued)
claims, then Defendants are entitled to a finding of no liability, not just qualified immunity.

Id.; *see also Domiano*, 904 F.2d at 1148 ("The due process clause requires that prior to the termination of a public employee with a property interest in his employment, the employer must give oral or written notice of the charges against the employee, explain the evidence against the employee, and give the employee an opportunity to present his side of the story to the employer.") In determining whether adequate due process has been provided, the Court must balance several factors, including:

> (1) the importance of the private interest at state; (2) the magnitude of the government's interest; and (3) the quality of the procedures employed in light of the relative strengths of the competing interests.

Swanson v. Village of Lake in the Hills, 962 F.2d 602, 604 (7th Cir. 1992), *citing Loudermill*, 105 S.Ct. at 1495.

Subsequent to the filing of Lickiss' Complaint, an arbitrator overturned the suspension and awarded Lickiss back pay and benefits for the relevant time period. In doing so, the arbitrator upheld Lickiss' demotion from sergeant to deputy and affirmed Defendants' position that back pay should be based on the rate paid a deputy. Lickiss now claims that he was denied due process when he was suspended without pay without an opportunity for a pre-deprivation hearing. Defendants contend that Lickiss is merely attempting to obtain review of the arbitrator's decision awarding him partial restitution. However, Lickiss responds that he does not seek review of the arbitrator's award, which is relevant only as to his actual out-of-pocket loss and

does not impede his ability to seek compensation in the form of damages for the violation of his constitutional rights.[8]

The Supreme Court, in addressing this issue, has held that:

> [A]lthough arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights.

McDonald v. City of West Branch, Michigan, et al., 466 US. 284, 104 S.Ct. 1799, 1803 (1984). This decision was premised upon the Supreme Court's determination that arbitrators are not experts in constitutional law, derive authority solely from the contracts in issue, and conduct a level of fact finding that is somewhat less exacting than judicial fact finding. *Id.* at 1803-04. Accordingly, the Court rejects Defendants' position and finds that, while the prior arbitral decisions in this matter

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[8] Presumably, the parties submitted this matter to arbitration pursuant to the terms of a collective bargaining agreement. Although the right to seek constitutional relief may in some circumstances be expressly waived in the arbitration provisions of the collective bargaining agreement, Defendants do not make that argument and there is no other evidence to that effect before the Court. As the record is silent in this respect, the Court therefore assumes that Lickiss did not voluntarily waive his right to bring this action by virtue of submitting to arbitration.

may be introduced as evidence in this action, they will not be afforded res judicata or collateral estoppel effect on the issue now before the Court.[9] *See McDonald*, 104 S.Ct. at 1804 n.13.

Defendants next contend that Lickiss was not denied procedural due process because the law only requires notice and a hearing prior to termination and he was only suspended without pay. Suspending police officers without pay deprives them of their property interest in their employment, and "the fact that benefits have merely been suspended briefly, rather than terminated, has never kept the state's action from being characterized as a deprivation." *D'Acquisto v. Washington*, 640 F.Supp. 594, 610 (N.D.III. 1986), *citing Confederation of Police v. City of Chicago*, 547 F.2d 375, 376 (7th Cir.), *cert. denied*, 431 U.S. 915, 97 S.Ct. 2175 (1977). Accordingly, suspension as well as discharge implicates due process rights. *Confederation of Police*, 547 F.2d at 376.

"One essential principle of due process is that an individual facing a deprivation be given 'some kind of hearing,'" presumably prior to the deprivation. *D'Acquisto*, 640 F.Supp. at 612, *quoting Loudermill*, 105 S.Ct. at 1493. However, if the interest of the employee is "sig-

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[9] Defendants rely on the Seventh Circuit's decision in *Papapetropoulos v. Milwaukee Transport Services*, 795 F.2d 591, 596-97 (7th Cir. 1986). However, their reliance is misplaced, as that case involved a § 1983 action seeking review of a purported denial of procedural due process with respect to the actual decision of the arbitrator, rather than a claim for damages as a result of a deprivation of constitutional due process rights by an employer that is separate and distinct from the issues resolved in the prior arbitration.

nificantly weaker" than that of the government employer, "a hearing which comes only after the deprivation has occurred is constitutionally adequate." *Id.* Similarly, even a substantial interest in employment can be overridden "in limited cases" by a particularly strong need for quick action on the part of the employer, "accompanied by a substantial assurance that the deprivation is not baseless or unwarranted," provided that a post-deprivation hearing follows promptly. *Jones v. City of Gary, Indiana*, 57 F.3d 1435, 1441 (7th Cir. 1995); *D'Acquisto*, 640 F.Supp. at 613.

Here, Defendants' interest in maintaining discipline and removing a purportedly untrustworthy public employee is strong. On the other hand, Lickiss' interest in retaining employment is also substantial. *Loudermill*, 105 S.Ct. at 1494. Although the suspension was relatively short-term, he was denied any opportunity to present his side of the case prior to Drexler's decision to suspend him without pay. *See Harrison v. City of Greenfield, Indiana*, 966 F.2d 315, 317 (7th Cir. 1992) (affirming holding of district court that where the employee is given some kind of opportunity answer charges prior to the decision to discipline, a short-term suspension does not require a pre-deprivation proceeding before a neutral party.) The question then is whether Defendants' interest is so strong that it overrides Lickiss' interests, demands prompt action, and justifies postponing his opportunity to be heard until after the initial deprivation.

Cases in which post-deprivation process has been found constitutionally sufficient have involved significant considerations for public safety justifying immedi-

ate action by the employer. *See D'Acquisto*, 640 F.Supp. 594 (involving police officers suspended for accepting bribes in the investigation of hit and run accidents and other violations); *Domiano*, 904 F.2d 1142 (holding that post-disciplinary hearing would be sufficient if fire chief's adamant refusal to follow the Village's emergency medical treatment policy and attempt to influence others reasonably posed a threat to public safety); *Jones*, 57 F.3d 1435 (need for fully staffed fire department sufficient to justify immediate action against firefighter who failed to report for his scheduled shifts); *Panozzo v. Rhoads*, 905 F.2d 135 (7th Cir. 1990) (police officer's absenteeism and repeated failure to appear in court as scheduled justified immediate suspension without pay where pretermination hearing occurred the next day); *Gilbert v. Homar*, ___ S.Ct. ___, 1997 WL 303380 (June 9, 1997) (immediate suspension justified where police officer had been charged with a felony because arrest and filing of criminal charges assured that purposes normally served by pre-suspension hearing had been met.)

The record in this case lacks a similar sense of urgency which would qualify this as an exceptional case in which the temporary abridgement of Lickiss' rights would be justified. Even when viewed in the light most favorable to Defendants, Lickiss was at best guilty of insubordination. There are no facts before the Court indicating that Lickiss engaged in criminal activity or conduct which was subversive to the interests of justice, posed any danger to public safety, or suffered from chronic absenteeism from his scheduled shifts. Rather, this would seem to be one of the situations perceived by the Court in *Loudermill* in which an employer purport-

edly perceives some hazard in keeping the employee on the job that does not reasonably justify immediate discipline without due process. In such a situation, the Supreme Court stated that an appropriate course of action would be to suspend with pay pending a hearing. *Loudermill*, 105 S.Ct. at 1495.

Lickiss had personal, financial, and professional interests in maintaining his employment with the Sheriff's Department that are entitled to great weight. Drexler's chosen method in dealing with the situation apparently failed to provide Lickiss with even the barest form of notice prior to his suspension, resulting in a fair risk of an erroneous deprivation. Furthermore, the fact that Hodgson later found it appropriate to reinstate Lickiss suggests that significant amounts of time and expense may have been avoided had Lickiss been given a pre-suspension hearing. Under the facts of this case, either a suspension with pay pending a hearing or a pre-suspension hearing would not have been unduly burdensome on Defendants in either a fiscal or administrative sense.[10]

The Court therefore concludes that under these circumstances, the governmental interest did not outweigh Lickiss' interests, thus rendering the post-deprivation process constitutionally insufficient. Accordingly,

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[10] Having concluded that any belief by Drexler that the situation with Lickiss posed such a danger that immediate suspension without procedural due process was justified was not objectively reasonable based on the clearly established state of the law at that time, which included cases such as *Loudermill*, *D'Acquisto*, *Domiano*, and *Panozzo*, the Court rejects Defendants' affirmative defense of qualified immunity on this claim.

Lickiss may proceed to trial with respect to his claim for damages as a result of his suspension without notice and an opportunity to be heard. Defendants' Motion for Summary Judgment is consequently denied with respect to Count II of the Complaint.

CONCLUSION

For the reasons set forth herein, Defendants' Motion for Summary Judgment [#90] is DENIED. This case is now ready to be set for a final pre-trial conference.

ENTERED this 17th day of June, 1997.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States District Judge